

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

**Defense Motion**  
For Continuance of Trial Date

19 June 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** Pursuant to RMC 906(b)(1), Defendant Salim Hamdan moves for a continuance of the trial in this matter to 22 September 2008, to allow adequate time for a careful and thorough examination of the issues raised by the Supreme Court's recent decision in *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008), and for rulings to assure that Commission proceedings are consistent with the guidance set forth in that important decision.
3. **Overview:** The Military Judge has the authority to grant continuances for as long and as often as may be required in the interests of justice. Under present circumstances, justice is best served by a nine week continuance of the trial date to allow the parties to carefully analyze the recent *Boumediene* decision, to thoroughly brief the issues, and to give the Commission the opportunity to ensure that future proceedings at Guantanamo conform to constitutional requirements consistent with *Boumediene*. *Boumediene* was decided in a manner sharply adverse to the Government, rejecting numerous positions advanced, and authorities relied upon, by the Government in this case. At the Government's urging, this Commission has issued a number of Rulings over the past seven months premised in part on the now-overruled D.C. Circuit opinion that constitutional protections did not apply at Guantanamo. Those Rulings need to be carefully reviewed in light of the reversal of the D.C. Circuit in *Boumediene*. Likewise, the guidance of the Supreme Court on Separation of Powers principles needs to be considered and implemented, as the Court made clear that it is the role of the judiciary, not the political branches, to say "what the law is." This means that recitals in the MCA concerning the content,

meaning, and application of the law are not necessarily authoritative and that, contrary to the Prosecution's arguments in this case, this Court need not defer to the political branches in this regard. This Commission correctly anticipated that a decision adverse to the Government in *Boumediene* could have significant impact on proceedings in this case, and that "re-schedu[ing] such proceedings" following an adverse decision "may be necessary." (D-040 Ruling at 3.) Accordingly, the Defense proposes 25 August 2008 as a date to begin hearings on legal motions arising from *Boumediene*, and a continuance of the trial to 22 September 2008. The Defense proposes that the 14 July 2008 hearing date be preserved for the RMC 909 hearing and the presentation of evidence and argument on the conditions of confinement motion (D-019), which is closely related to Mr. Hamdan's mental competence and his ability to cooperate intelligently in the defense of the case.

4. **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the Defense as the moving party. RMC 905(c)(2)(A).

5. **Facts:**

- A. The current charges against Mr. Hamdan were referred by the Convening Authority on 10 May 2007.
- B. On 4 June 2007, the Military Judge granted a Defense motion to dismiss the charges due to lack of personal jurisdiction.
- C. On 8 June 2007, the Prosecution moved for reconsideration of the dismissal of charges.
- D. On 17 October 2007, following a decision by the Court of Military Commissions Review in *U.S. v. Khadr* (24 September 2007), the Commission granted the Prosecution's motion to reconsider and ruled that it would hold an evidentiary hearing on the jurisdictional question.
- E. On 5-6 December 2007, the Commission held its evidentiary hearing on the jurisdictional question of whether Mr. Hamdan is an unlawful enemy combatant.

- F. On 19 December 2007, the Commission made a finding, based on a preponderance of the evidence, that Mr. Hamdan is an unlawful enemy combatant and therefore subject to the jurisdiction of this Commission. In reaching that decision, the Commission relied in part on the decision of the Court of Appeals for the D.C. Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Specifically, the Commission stated that "[t]he accused's challenge to the exercise of jurisdiction as a violation of the equal protection clause must...fail," as the D.C. Circuit in *Boumediene* had "expressly ruled that the United States Constitution does not protect detainees at Guantanamo Bay." (19 December 2007 Ruling on Reconsideration at 10.)
- G. On 20 December 2007, the Commission issued a Scheduling Order setting Mr. Hamdan's trial to start on 28 May 2008.
- H. On 16 May 2008, the Commission granted the Defense Motion for Continuance (D-040), setting a new trial date of 21 July 2008. The Commission based that Ruling on the fact that the D.C. Circuit's decision in *Boumediene* was under review by the U.S. Supreme Court, and a decision from the Supreme Court was expected shortly. The Commission noted that the Supreme Court decision in *Boumediene* "may well change the tenor or conduct of the trial." (D-040 Ruling at 2.)
- I. In its 16 May 2008 Ruling, the Commission stated that "[i]f the decision [in *Boumediene*] is adverse to the Government, or otherwise requires amendment of this schedule, the Commission will consult the parties and re-schedule such proceedings as may be necessary." (D-040 Ruling at 3.)
- J. On 6 June 2008, the Commission issued a Ruling on D-030, the Defense Motion to Suppress Statements of the Accused based on the right against self-incrimination. The Commission denied the motion, again based in part on the D.C. Circuit's view that Guantanamo detainees could not invoke the protections of

the U.S. Constitution. For example, the Commission stated that "the Constitution's ex post facto provision does not protect the accused in a military commission." (D-30 Ruling at 4.) The Commission noted that "[t]he result in this case [i.e., denial of a motion to suppress pre-trial statements] is at odds with what would normally obtain under our law. It is true that in any other criminal trial held in American courts, an accused who was questioned before trial, without warning regarding his right to remain silent, could not later be prejudiced by the admission of those statements against him." *Id.*

- K. On 12 June 2008, the Supreme Court released its decision in *Boumediene*, reversing the D.C. Circuit and holding that "[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" (*Boumediene*, 553 U.S. \_\_\_, slip op. at 35 (2008), quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). In reaching this decision, the Supreme Court relied heavily on the *Insular Cases* dating from the period following the Spanish-American War. The Court noted that in those cases it "took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id.*, slip op. at 28 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).
- L. The Defense believes that numerous motions need to be prepared, filed, and argued before the Commission to properly implement the guidance set forth in *Boumediene* and assess the manner in which constitutional provisions apply to military commission proceedings. In addition, certain Rulings that have already been made by the Commission, *i.e.*, those premised on the D.C. Circuit's *Boumediene* decision (now overruled), need to be reconsidered. A listing and explanation of those motions is set forth in the Argument section below.

**6. Law and Argument:**

**A. The Military Judge Has Discretion to Grant a Continuance Upon a Showing of Reasonable Cause**

MCA § 949e provides: "The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." RMC 707(b) provides that a continuance may be granted by the military judge upon a "finding that the interests of justice served by taking such action outweigh the best interests of the public and the accused in a prompt trial of the accused." Discussion to RMC 906 in the Manual for Military Commissions states:

The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of the Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.

Under present circumstances, the interests of justice weigh heavily in favor of the two month continuance requested by the Defense.

**B. A Continuance Is Needed to Allow Adequate Time for Briefing on the Import of the Supreme Court's *Boumediene* Decision**

In *Boumediene v. Bush*, the U.S. Supreme Court held that the protections of the Suspension Clause of the U.S. Constitution extend to Guantanamo Bay, as "the United States has maintained complete and uninterrupted control of the bay for over 100 years." *Boumediene v. Bush*, 553 U.S. \_\_\_, slip op. at 34-35, 39 (2008) ("Guantanamo...is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States"). The Court rejected the Government's argument, heard also in this case, that "the Constitution [has] no effect [at Guantanamo], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term." *Id.* at 35. In assessing whether constitutional protections apply, the Court rejected a "rigid and abstract rule" such as *de jure* sovereignty, and focused instead on "whether judicial enforcement of [a constitutional] provision

would be 'impracticable and anomalous.'" *Id.* at 30, quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring). In the case of proceedings involving Guantanamo detainees, the Court held that "there are few practical barriers to the running of the writ," as the United States has exercised complete control at Guantanamo for over a century. *Id.* at 41.

The Court also made explicit what was implicit in the *Hamdan v. Rumsfeld* decision, the principle that structural limitations on the powers of the U.S. Government apply wherever the powers of the Government are exercised, and those principles can be invoked by noncitizens in American courts: "Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene*, slip op. at 12 (citations omitted).

In addition, the Court emphasized that it is the role of the judiciary, not the political branches, to determine the content of the law, and whether that law applies in any given situation. The Court rejected arguments that "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* at 36 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch ) 137, 177 (1803)).

The *Boumediene* holding that both substantive and structural constitutional protections extend to Guantanamo has major implications for this case. These implications must be carefully analyzed in numerous areas of law and procedure, including personal jurisdiction, subject matter jurisdiction, admissibility of evidence, production of witnesses, the availability of certain defenses, pre-trial and trial procedure, and the validity of provisions in the MCA in which Congress purports to provide authoritative statements on what the law is. A continuance to allow the parties to fully research and brief these issues is amply warranted in order to ensure that the Commission properly applies the lessons of *Boumediene*.

Specifically, the Defense believes that, at a minimum, the following motions should be presented to the Court and decided before trial:

1. Reconsideration of 19 December 2007 Ruling on personal jurisdiction. That Ruling set

forth a finding that this Commission has personal jurisdiction to try Mr. Hamdan. It was based in part on the rejection of the Defense's Equal Protection argument due to the now-reversed Circuit Court opinion in *Boumediene* that constitutional protections did not apply at Guantanamo. (19 December 2007 Ruling on Reconsideration at 10.)

2. Reconsideration of Ruling (D-030) regarding right against self-incrimination. The 6 June 2008 Ruling (D-030) was also premised in part on the perceived unavailability of constitutional rights to criminal defendants in military commissions under the MCA. The Defense needs to brief the applicability of the Fifth Amendment protection against self-incrimination, as well the ex post facto nature of the Government's effort to strip detainees of those protections by means of the MCA. In addition, the Commission should reconsider any ruling to the extent that it is based on the fact that "Congress has expressly determined that the MCA satisfies" obligations imposed by treaty or international law, as the Supreme Court has clarified that such determinations are the province of the judiciary, not the political branches. (D-030 Ruling at 4; *Boumediene*, slip op. at 36.)

3. Renewed motion to suppress statements based on coercion. The Defense needs to brief the Fifth Amendment Due Process issues raised by the use of testimony obtained through a systematic, carefully planned, and highly controlled regime of punitive conditions and coercive and deceptive interrogation techniques designed to "disorient and disorganize" detainees, techniques that were applied to the Accused in this case. The need for a continuance to prepare such a motion is enhanced by the fact that, despite its many statements to the Commission that it has produced all records relating to Mr. Hamdan's confinement (and Orders to that effect, *see* 4 April 2008 Ruling on D-020), the Government has yet to turn over hundreds of pages of such material. Rather, the Government now states that it intends to produce a large quantity of Detainee Information Management System (DIMS) records to the Defense *this week*. The failure to produce such records as previously ordered<sup>1</sup> has prejudiced the Defense in submitting

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<sup>1</sup> The Commission originally set a 31 December 2007 discovery deadline for the Prosecution. *See* 20 December 2007 Final Trial Schedule at 1.

necessary pretrial motions, and impaired its ability to adequately prepare for trial.

4. Motion to compel access to High Value Detainees. The Defense needs to brief the Sixth Amendment right of criminal defendants "to have compulsory process for obtaining witnesses in his favor." This right, combined with new circumstances relating to the public appearance of the High Value Detainees ("HVDs") in an arraignment on 5 June 2008, warrants reconsideration by the Commission of the limited access provided to the HVDs by means of written questions.

5. Motion relating to the effective assistance of counsel. The Defense needs to submit briefing on the Sixth Amendment right of a criminal defendant to "the assistance of counsel for his defense," a right that has been materially impaired by the totality of the circumstances at the Guantanamo Bay Naval Station, including particularly the conditions of confinement that have undermined the ability of the Accused to maintain a working relationship with Defense counsel.

6. Motion to exclude hearsay evidence. The Prosecution has submitted a lengthy Hearsay Notice, listing over 50 items of hearsay evidence that it intends to introduce at trial. The Defense needs to brief the Sixth Amendment right of a criminal defendant "to be confronted with the witnesses against him," and to otherwise address whether the MCA's hearsay provision, 10 U.S.C. § 949a(b), comports with constitutional requirements.

7. Motion for a speedy and public jury trial. The Defense needs to brief the Sixth Amendment right of a criminal defendant "to a speedy and public trial, by an impartial jury" and to address whether the trial by military commission contemplated by the MCA is consistent with this right.

8. Motion to dismiss for failure to indict by grand jury. The Defense needs to brief the question of whether the following provision of the Fifth Amendment applies in this case: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

9. Supplemental briefing on the ex post facto nature of the prosecution. If the Commission would find it helpful, the Defense also stands ready to provide supplemental briefing on the Ex Post Facto nature of the charges against Mr. Hamdan. This goes to the subject matter



jurisdiction of this Commission, an issue raised by the Defense in a motion filed on 9 January 2008, and argued on 7 February 2008.<sup>2</sup> See *Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.") In this case, the conditions required by *Quirin* for the exercise of jurisdiction are not satisfied, as the acts charged are not offenses under the law of war and the trial of Mr. Hamdan on these charges is prohibited by the Ex Post Facto Clause. In this context, the instruction of the Supreme Court in *Boumediene* with respect to the Suspension Clause is also applicable with respect to the Ex Post Facto Clause: "The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, slip op. at 36. In other words, recitals by Congress in the MCA that the offenses it criminalizes are pre-existing offenses under the law of war are without any legal effect, as "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Boumediene*, slip op. at 36.

This Commission has already noted that the *Boumediene* decision "may well change the tenor or conduct of the trial," and that in the event of a decision adverse to the Government, it would "consult the parties and re-schedule such proceedings as may be necessary." (D-040 Ruling on Motion for Continuance at 3). The Commission's anticipation that the Supreme Court's *Boumediene* decision might present good cause for a continuance was well founded. The *Boumediene* decision is a broad repudiation of many of the arguments advanced and authorities relied upon by the Government in this case. A large array of constitutional rights and protections now must be considered, affecting all aspects of the substantive and procedural law that must be applied in this case. The Supreme Court's reliance on the *Insular Cases* requires counsel and the

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<sup>2</sup> The Prosecution's primary argument in opposition to the Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges was that "the accused cannot reasonably claim any constitutional protections, including with respect to the Ex Post Facto Clause." See 23 January 2008 Government Response re Ex Post Facto at 1, 4. This argument is no longer tenable in light of the *Boumediene* decision. While granting the Defense motion would result in dismissal of the current charges, it would not necessarily entail Mr. Hamdan's release from confinement, as the Government stills holds Mr. Hamdan as an alleged enemy combatant.

Commission to carefully examine a large body of case law (over twenty reported cases) to assess the relevance of that authority to the trial of the Accused. Likewise, the Court's emphasis on practical considerations and specific circumstances in determining how fundamental rights apply in different settings will entail considerable investigation and deliberation.

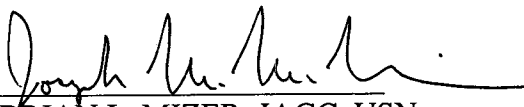
For these reasons, the Defense believes that a continuance of nine weeks – to 22 September 2008 – is necessary to promote the interests of justice. That modest delay is needed to prepare the above-mentioned motions, present argument on them to the Commission, and provide the Commission with sufficient time to consider and rule on them.

This short delay will not prejudice the Government in any way. Mr. Hamdan has been held as an enemy combatant without trial for six and a half years, and he will continue to be held throughout the pre-trial period. This modest additional delay to ensure that the trial is conducted properly will, as the Commission has noted, "avoid[] potential embarrassment, waste of resources, and prejudice to the accused...or the need to retry the case" that could accompany a hasty and mistaken application of the guidance set forth in *Boumediene*. (D-040 Ruling at 2.) For these reasons, the trial date should be continued to 22 September 2008, and a hearing on the newly filed motions should be set for 25 August 2008.


The Defense respectfully suggests that the 14 July 2008 hearing date be preserved for the RMC 909 hearing on mental competence, and the closely-related motion on punitive conditions of confinement (which presents the question of whether those conditions have impaired the right to counsel) also be argued on 14 July.

7. **Request for Oral Argument:** The Defense does not request oral argument.
8. **Request for Witnesses:** The Defense does not anticipate the need to call witnesses, but reserves the right to do so should the Government Response raise issues requiring rebuttal by live testimony.
9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, who oppose the relief requested by this motion.

Respectfully submitted,

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